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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JEAN COLLINS, an indivicual and TERRY COLLINS, her husband

Petitioners,

vs.

GREENE COUNTY MEMORIAL HOSPITAL, a corporation; and ABUNAVA DAS, M.D.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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58 pp

QUESTIONS PRESENTED FOR REVIEW

1. May the Courts of Pennsylvania disregard and ignore a statute (42 Pa.C.S.A. §5535) promulgated and enacted by the Legislature of the Commonwealth of Pennsylvania, which statute gives litigants one year to transfer a cause of action to state court which has been dismissed from federal court for lack of jurisdiction?

2. Was due process violated when the Courts of Pennsylvania judicially amended the Pennsylvania Transfer Statute (42 Pa.C.S.A. §5103) by adding the word "prompt" or "promptly," which word does not exist in the statute and which was not defined in any way by any Pennsylvania court, thus denying the Petitioners the right to transfer their claim from federal to state court six and one half months after their claim was dismissed from federal court?

3. Does the Superior Court of Pennsylvania's requirement of "promptness", affirmed by the Supreme Court of Pennsylvania, Per Curiam, render the Pennsylvania transfer statute unconstitutionally vague, since, (1) the court disregarded the fact that the word "prompt" or "promptly" does not exist in the statute, (2) the court provided no definition of the word "prompt" or "promptly," (3) the court provided no time period within which to effect a transfer and, (4) the court ignored Pennsylvania's Savings Statute (42 Pa.C.S.A. §5535) which provides a litigant one year to effect a transfer?

4. Is it a denial of due process for the Courts of Pennsylvania to retroactively rule that the transfer of a case from federal to state court for lack of federal jurisdiction is not "prompt" when, (1) the word "prompt" or "promptly" does not exist in the statute, (2) a "promptness" requirement amounts to a judicial amendment of the statute, (3) the Petitioners case was transferred from federal to state court in less than seven months after being dismissed from federal court, (4) the court provided no guidance for Petitioners or future litigants as to what it meant by the word "prompt" or "promptly" since it failed to provide a definition of the term "prompt" or "promptly", and (5) the Pennsylvania Legislature

through its Savings Statute grants a litigant one year to effect a transfer?

5. Is due process violated when a lower state appellate Court acts outside its jurisdiction or authority by adding to the Pennsylvania Transfer Statute the procedural amendment of "promptness," when the Pennsylvania Constitution places procedural rule making power exclusively within the jurisdiction of the Pennsylvania Supreme Court, and, thereafter, the Pennsylvania Supreme Court affirms, Per Curiam, the lower appellate courts ruling?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT PENNSYLVANIA

OPINIONS BELOW

The Supreme Court of Pennsylvania affirmed an Order of the Superior Court of Pennsylvania, Per Curiam, without opinion, after granting Petitioners' Petition for Allowance of Appeal and oral argument, No. 45 Western District Appeal Docket 1993, (Appendix "A-2"). Pennsylvania Supreme Court Justice Nicholas Papadakos filed a dissenting opinion, (Appendix "A-3, 4"), which is reported at 640 A.2d 379, ___ Pa. ___ (1994). The opinion of the Superior Court of Pennsylvania is reported at 419 Pa. Super. 519, 615 A.2d 760 (1992). The written opinion and order of the Court of Common Pleas of Greene County, Pennsylvania is unreported, (Appendix "A- 24-27").

STATEMENT OF JURISDICTION

The Order of the Supreme Court of Pennsylvania was entered on April 13, 1994, ("A-2"), affirming the Order of the Superior Court of Pennsylvania, Per Curiam. An Application for Rehearing was timely filed and was denied on May 11, 1993, ("A-1"). This petition for a Writ of Certiorari was filed within 90 days of that date pursuant to Supreme Court Rule 13.4. This Court has jurisdiction to review the Supreme Court of Pennsylvania decision by Writ of Certiorari pursuant to 28 U.S.C. § 1257. The enforcement of the Pennsylvania Supreme Court judgment will deprive the Petitioners of their federal and state rights of due process and trial by jury. The Petitioners have a right to Supreme Court review because the Petitioners have presented their due process claims and right to trial by jury claims in the State courts below. The Courts of Pennsylvania have denied the Petitioners' due process rights and right to trial by jury in the following ways:

1) By dismissing Petitioners claim, the Courts of Pennsylvania have disregarded and ignored Pennsylvania statute 42 Pa.C.S.A. § 5535 which in conjunction with 42 Pa.C.S.A. § 5103(b) gives a litigant one year to transfer a case from federal court to state court which has been dismissed from federal court for lack of federal court jurisdiction. Petitioner timely transferred her action in less than seven months;

2) The Supreme Court of Pennsylvania's Per Curiam affirmance of a Superior Court Order that transfer be made "promptly" when a case is dismissed from federal court for lack of jurisdiction is a violation of federal due process because (1) the undefined term "prompt" or "promptly" is unconstitutionally vague, (2) the term "prompt" or "promptly" does not exist in the statute, (3) the Superior Court did not have authority to create a "promptness" requirement and, (4) the Pennsylvania courts ignored the Pennsylvania Savings Statute which provides a litigant one year to effect a transfer;

3) The Courts of Pennsylvania retroactive ruling that a case transferred from federalcourt to state court for lack of federal jurisdiction within seven months is not "prompt" violates due process because, (1) the word "prompt" or "promptly" does not exist in the statute, (2) the "promptness" requirement amounts to a judicial procedural amendment of the stat (3) the Superior Court had no authority whatsoever to procedurally amend the statute, (4) since the court failed to define the word "prompt" or "promptly" Petitioners had no notice of what their obligations were under the amended statute.

The Petitioners throughout this litigation have argued that the statute created by the Courts of Pennsylvania, and not the Pennsylvania Legislature, is vague, unfair and violates the Petitioners Constitutional rights to due process.

U.S. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Due Process Rights

The Fifth Amendment to the Constitution of the United States of America states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the Constitution of the United States of America states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State Shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive a person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Right to trial by jury and to have the factual issues examined by a jury.

The Seventh Amendment to the Constitution of the United States of America states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

The Petitioners, Jean Collins and Terry Collins have filed this Writ of Certiorari because the rulings of the Courts of the Commonwealth of Pennsylvania have denied the Petitioners' Fifth and Fourteenth Amendment due process rights and their Seventh Amendment right to trial by jury. The Courts of Pennsylvania have without authority disregarded and ignored a statute promulgated and enacted by the Legislature of Pennsylvania which allows a litigant one year to transfer an action which has been dismissed form federal court for lack of jurisdiction to state court. Also, the Courts of Pennsylvania have created a new statute and have applied that new statute retroactively to the Petitioners thus depriving the Petitioner of due process, equal protection of the laws and their right to trial by jury. Moreover, the Courts of Pennsylvania have created a vague statute by requiring "prompt" transfer without setting a specific time limit, thus giving litigants no direction as to when a transfer is timely. Furthermore, the "prompt" transfer

requirement was created by the Superior Court of Pennsylvania which has no authority to create such a requirement. "Prompt" or "promptly" does not exist in the Transfer Statute. Therefore, the Superior Court of Pennsylvania's Order denying the Petitioners' transfer to State Court is a nullity and the Affirmance, Per Curiam, by the Supreme Court of Pennsylvania of the decision is a nullity and a violation of the Petitioners due process rights and their right to trial by a jury.

A. Factual Statement

On or about October 8, 1986, the Respondent Arunava Das, M.D., sexually molested and forced oral copulation upon the Petitioner, Jean Collins. These acts took place at Greene County Memorial Hospital, the other Respondent to this Writ of Certiorari. Both Arunava Das, M.D., and Jean Collins were employees of Greene County Memorial Hospital at the time. These appalling and outrageous acts by Respondent, Arunava Das, M.D., have caused Mrs. Collins great pain and suffering.

B. Procedural Statement

On April 29, 1988, the Petitioners Jean and Terry Collins timely filed a Complaint in the United States District Court for the Western District of Pennsylvania for the damages inflicted upon them as a result of the October 8, 1986 incident. The Federal District Court exercised jurisdiction over this action even though all parties were Pennsylvania residents because the Complaint included a claim under Title VII of the Civil Rights Act of 1964, 421 U.S.C., §2000(e), (hereinafter "Title VII"), against the Respondent, Greene County Memorial Hospital. The court also exercised pendant jurisdiction over common law claims alleging negligence and intentional infliction of emotional distress.

On August 8, 1990, the Petitioners Jean and Terry Collins accepted the Respondent, Greene County Memorial Hospital's offer of Judgment pursuant to F.R.C.P. 68 in regard to the Title VII claim against the Respondent Hospital. Since the parties settled the federal claim, the district court judge dismissed the action because the case no longer involved a federal question and because the Pennsylvania State Transfer Statute 42 Pa.C.S.A. § 5103(b), would

allow the Petitioners to pursue there common law claims in State court without the threat of a statute of limitations problem, (see order ("A-28, 29"). The pertinent statutes are quoted at length on pages 6,7,8 and 9 below.

On March 19, 1991, less then seven months after dismissal from federal court, the Petitioners filed all necessary papers in the Court of Common Pleas of Greene County, Pennsylvania, pursuant to Pennsylvania's 42 Pa.C.S.A. § 5103(b), to have the case transferred. After the case was transferred the Respondents filed preliminary objections claiming that the transfer was untimely. On June 7, 1991, Judge Grimes of the Court of Common Pleas of Greene County, Pennsylvania sustained the preliminary objections on the grounds that the Petitioners' transfer was not "prompt" as required by the "express" language of the Transfer Statute, ("A- 24-26"). However, the word "prompt" or "promptly" does not appear in the Transfer Statute and the Transfer Statute specifically gives a litigant one year to transfer his/her cause of action from federal to state court.

The Petitioners timely filed a Notice of Appeal of Judge Grimes decision to the Superior Court of Pennsylvania. The Superior Court affirmed Judge Grimes decision even though the Transfer Statute specifically gives a litigant one year to transfer a cause of action from federal court to state court. The Superior Court of Pennsylvania ruled that a transfer must be made "promptly" without giving a specific time limitation, and that six and one half months was not "prompt", ("A-5"), thereby discarding the reference in the Transfer Statute, 42 Pa.C.S.A. §5103(b), to the Pennsylvania Savings Statute, 42 Pa.C.S.A. § 5535, which expressly provides litigants one year to transfer the action.

The Petitioners timely filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania which was granted. After oral argument the Supreme Court of Pennsylvania affirmed the Order of the Superior Court of Pennsylvania, Per Curiam, without opinion, ("A-2"), thus creating a new statute in Pennsylvania without due process, notice or fairness. The Petitioners requested a rehearing which was denied by the Supreme Court of Pennsylvania on May 11, 1994. ("A-1").

REASONS FOR GRANTING A WRIT OF CERTIORARI

I

THE COURTS OF PENNSYLVANIA VIOLATED THE PETITIONERS DUE PROCESS RIGHTS AND RIGHT TO TRIAL BY JURY BY DISREGARDING A STATUTE PROMULGATED AND ENACTED BY THE LEGISLATURE OF THE COMMONWEALTH OF PENNSYLVANIA.

The Courts of Pennsylvania have disregarded and ignored a statute promulgated and enacted by the Legislature of Pennsylvania and have created a new and vague time limitation to transfer a cause of action from federal court to state court without adequate notice and have deprived the Petitioners of their constitutional rights of due process and trial by jury. On August 23, 1990, the United States District Court for the Western District of Pennsylvania, dismissed the Petitioners claim for lack of jurisdiction. On March 19, 1991, less than seven months after the dismissal from federal court the Petitioners transferred their case from United States District Court for the Western District of Pennsylvania to the Court of Common Pleas of Greene County, Pennsylvania, well within the one year time limitation required by the Legislature of the Commonwealth Pennsylvania in 42 Pa.C.S.A. § 5103 and 42 Pa.C.S.A. § 5535, which in pertinent part provide:

42 Pa. C.S.A. § 5103 provides.

> **(a) General rule.** —If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth which does not have jurisdiction of the appeal or other matter, the court or district justice shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this commonwealth, where the appeal or the other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was

first filed in a court or magisterial district of this Commonwealth. A matter which is within the exclusive jurisdiction of a court or district justice of the Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court or magisterial district of this Commonwealth where it shall be treated as if originally filed in the transferee court or magisterial district of this Commonwealth on the date when first filed in the other tribunal.

(b) Federal cases.

(1) Subsection (a) shall also apply to any matter transferred or remanded by any United States court for a district embracing any part of this Commonwealth. In order to preserve a claim under Chapter 55 (relating to limitation of time), a litigant who timely commences an action or proceeding in any United States court for a district embracing any part of this Commonwealth is not required to commence a protective action in a court of before a district justice of this Commonwealth. Where a mater is filed in any United States court for a district embracing any part of this Commonwealth and the matter is dismissed by the United States court for lack of jurisdiction, any litigant in the matter filed may transfer the matter to a court or magisterial district of this Commonwealth by complying with the transfer provisions set forth in paragraph (2).

(2) Except as otherwise prescribed by general rules, or by order of the United States court, such transfer may be effected by filing a certified transcript of the final judgment of the United States court and the related pleadings in a court or magisterial district of this Commonwealth. The pleadings shall have the same effect as under the practice in the United States Court, but the transferee court or district justice may require that they be amended to conform to the practice in this Commonwealth. Section 5535(a)(2)(i) (relating to ter-

mination of the prior matter) shall not be applicable to a matter transferred under this subsection. (Emphasis added).

42 Pa. C.S.A. § 5535 (a) provides:

(1) **If a civil action or proceeding is timely commenced and is terminated, a party, or his successor in interest, may, notwithstanding any other provision of this subchapter, commence a new action or proceeding upon the same cause of action within one year after the termination** and any other party may impose any defense or claim which might have ben interposed in the original action or proceeding.

(2) Paragraph (1) does not apply to:
(i) An action to recover damages for injury to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

(ii) An action or proceeding terminated by voluntary non-suit, neglect to prosecute the action or proceeding, or final judgment upon the merits.

(emphasis added.)

Clearly any reading of 42 Pa.C.S.A. § 5103 and 42 Pa.C.S.A. § 5535, unequivocally dictates that the Legislature of Pennsylvania intended to provide a litigant one year to transfer a wrongful death or personal injury claim dismissed from a United States court for lack of jurisdiction to a Pennsylvania state court. Why else would 42 Pa.C.S.A. § 5103(b)(2), expressly state "Section 5535(a)(2)(i) (relating to termination of the prior matter) shall not be applicable to a matter transferred under this subsection," the federal transfer section. Certainly the Legislature specifically intended that all litigants, including those with personal injury or wrongful death claims, are to have one year to transfer a cause of action from federal to state court when the action is terminated in federal court due to lack of subject matter jurisdiction.

42 Pa.C.S.A. § 5535 (a) (1) states; "If a civil action or proceeding is timely commenced and is terminated, a party, or his successor in interest, may, notwithstanding any other provision of this subchapter, commence a new action or proceeding upon the same cause of action within one year after the termination . . ." The Petitioners action in federal court was dismissed, i.e. it was terminated. 42 Pa.C.S.A. § 5103(b), gives a litigant the right to transfer a cause of action terminated in federal court for lack of jurisdiction to State Court. 42 Pa.C.S.A. §5103(b)(2) specifically states "Section 5535(a)(2)(i) (relating to termination of the prior matter) shall not be applicable to a matter transferred under this subsection." 42 Pa.C.S.A. Section 5535(a)(2)(i), does not allow a litigant to "save" or recommence "any action to recover damages for injury to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence of another", once it has been terminated. Since Section 42 Pa.C.S.A. Section 5535(a)(2)(i), does not apply to cases transferred from federal court to state court for lack of jurisdiction, (see, 42 Pa. C.S.A. § 5103(b)(2)), Section 5103(b) and Section 5535, specifically provide a litigant with one year to transfer a personal injury or wrongful death claim from federal court to state court when the action has been dismissed for lack of jurisdiction. The Courts of Pennsylvania have decided to disregard and ignore 42 Pa.C.S.A. §5535 and make their own requirement that the transfer be made "promptly" without defining the meaning of the word "prompt" or "promptly", in the context of a transfer. The Courts of Pennsylvania have violated the due process rights of the Petitioners by disregarding and ignoring the statutes enacted by the Commonwealth of Pennsylvania, and amending the Transfer Statute by unlawfully adding the undefined word "prompt" or "promptly".

Statues once enacted must be followed and courts cannot deviate from the clear meaning of the statute. In Service v. Dulles, 354 U.S. 363, 77 Sct. 1152, 1 L.Ed.2d 1403 (1957), the Court ruled that rules once promulgated can not be ignored unless and until they are effectively repealed. See also, Accardi v. Shaughnessy, 347 U.S. 260, 74 Sct. 499, 98 L.Ed. 681 (1959), this case held that a failure to follow promulgated rules is a violation of due process.

The Petitioners brought to the Supreme Court of Pennsylvania's attention that 42 Pa.C.S.A. § 5535, read in conjunction with 42 Pa.C.S.A. § 5103, clearly gives a litigant one year to transfer an action for personal injury or death to state court if the case was dismissed from federal court for lack court jurisdiction. The Supreme Court of Pennsylvania decided to ignore and disregard the clear meaning of the statute and affirm the Superior Court of Pennsylvania, Per Curiam, without opinion. Clearly when a Court disregards and ignores the plain meaning of a statute and creates a new statute by inserting the word "prompt" or "promptly" into the statute a litigant's due process rights have been violated. Service, Supra.

II

THE SUPERIOR COURT OF PENNSYLVANIA VIOLATED THE PETITIONERS' DUE PROCESS RIGHTS BY ENFORCING A PROCEDURAL ORDER ILLEGALLY CREATED BY THE SUPERIOR COURT THAT REQUIRES CASES DISMISSED FROM FEDERAL COURT FOR LACK OF JURISDICTION BE TRANSFERRED TO STATE COURT "PROMPTLY". FURTHERMORE THE WORD "PROMPTLY" IS NOT DEFINED IN THE ORDER AND THEREFORE IS VAGUE ON IT'S FACE AND VIOLATES THE PETITIONERS' DUE PROCESS RIGHTS.

In this case below the Superior Court of Pennsylvania Ordered that a litigant must "promptly" transfer an action which has been dismissed from federal court for lack of jurisdiction to state court and that the Petitioners did not "promptly" transfer their action, ("A-11"). This Order was affirmed, Per Curiam, by the Supreme Court of Pennsylvania without opinion; however, Supreme Court Justice Papadakos dissented raising the very issues created by this case. The Superior Court Order that an action must be transferred "promptly" is vague on its face and violates the Petitioners' due process rights guaranteed by the United States Constitution.

The Petitioners transferred their case to a Pennsylvania state court within seven months of being dismissed from federal court. The Superior Court of Pennsylvania, without notice decided that seven months was not "prompt" enough and found for the Respondents in this action. The Superior Court of Pennsylvania made this decision based on dicta contained in a previous Superior Court of Pennsylvania ruling[1] which stated;

". . . we now emphasize that in order to protect the timeliness of an action under 42 Pa. C.S.A. § 5103, a litigant, upon having his cases dismissed in federal court for lack of jurisdiction, must "promptly" file a certified transcript of the final judgment of the federal court and, at the same time, a certified transcript of the pleadings from the federal action. The litigant shall not file new pleadings in state court." Williams v. F.L. Smithe Machine Co., Inc., 395 Pa.Super. 511, 577 A.2d 907 (July 1990).

First, the Superior Court of Pennsylvania had no authority to create a new procedural rule. Article V § 10(c) of the Pennsylvania Constitution, specifically provides the Supreme Court of Pennsylvania with the exclusive power to make procedural rules in the state of Pennsylvania. Since the Superior Court of Pennsylvania did not have authority to "enact" a "promptness" requirement, its Order dismissing Petitioners claim is a nullity, see, Commonwealth v. Boerner, 281 Pa.Super. 505, 422 A.2d 583, 587, (1980)(when a court takes action beyond the power conferred on it by law . . . its action is a nullity . . .). Because the "prompt" transfer requirement by the Superior Court of Pennsylvania is a nullity the Petitioners were not on notice of any requirement that the transfer must be "prompt". The dismissal of Petitioner's case by the Superior Court of Pennsylvania and the affirmance of this dismissal by the Supreme Court of Pennsylvania, Per Curiam, without opinion, with only a dissent raising the present issues, is a violation of the Petitioners' due process rights. Insofar as the Superior Courts "promptness" requirement was a nullity from the beginning there was nothing for the Supreme Court of Pennsylvania to affirm. See Boerner, Supra.

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1 Ironically, the Plaintiff in this prior case attempted to transfer her claim from federal to state court seven months after being dismissed from federal court for lack of subject matter jurisdiction. The court found that transfer to be timely.

Second, the Superior Court of Pennsylvania's attempt to create a procedural statute was a complete failure. The use of the word "prompt" or "promptly" with no definition violates every rule of statutory construction and due process. A statue is unconstitutionally vague when it "either forbids or requires the doing of an act in terms so vague that men of ordinary intelligence must necessarily differ as to its application" Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L. Ed. 322 (1926). Men of ordinary intelligence differ as to the definition of "prompt" or "promptly". In fact Black's Law Dictionary, Sixth Edition, states "[T]he meaning of the word [promptly] depends largely on the facts in each case, for what is "prompt" in one situation may not be considered such under other circumstances of conditions." The Superior Court of Pennsylvania in its decision never provided a definition for the words "prompt" or "promptly" in the context of a transfer. The only thing known at this point is that the Superior Court of Pennsylvania does not consider just under seven months "prompt" but this fact was not known at the time the Petitioners were dismissed from federal court. See Williams v. Smithe, Supra., 577 A.2d 907. As Justice Papadakos stated in his dissenting Opinion to the Supreme Court's Per Curiam affirmance:

> "In fact, the Superior Court opinion does not specifically adopt a thirty day rule but only concludes that policy reasons justify that a party act "promptly" in transferring his action which has been dismissed for lack of jurisdiction by the federal courts. I would have preferred that we take the opportunity and set a rule for such situations and consider whether there are equitable circumstances which can excuse a delayed filing as well as consider whether the party seeking to dismiss a transfer request based on lateness must also demonstrate that the plaintiff's tardiness has caused him prejudice. Because all of these questions remain unanswered, I believe the per curiam disposition of this appeal does a disservice to the bar and these litigants. ("A - 4").

This Honorable Court should rule that the use of the word "prompt" or "promptly" in regards to a filing requirement, when substantive rights are at issue is vague and violates the due process

clause of the United States Constitution. Furthermore, insofar as the Superior Court did not have the authority to mandate a "promptness" requirement, since only the Supreme Court of Pennsylvania could make such a mandate, see, Article V § 10(c) of the Pennsylvania Constitution, this Honorable Court should rule that the Petitioners did not have notice of any "promptness" requirement for transferring their claim as is required by the due process clause of the United States Constitution.

III

THE RETROACTIVE RULING THAT AN ACTION MUST BE TRANSFERRED "PROMPTLY" FROM FEDERAL COURT TO STATE COURT WHEN THE ACTION L A C K S FEDERAL JURISDICTION AND THAT "PROMPTLY" IS LESS THAN JUST UNDER SEVEN MONTHS VIOLATES THE PETITIONERS' DUE PROCESS RIGHTS

For the first time the Courts of Pennsylvania have dismissed a claim that was first instituted in federal court and later dismissed for lack of jurisdiction and then transferred to state court because it was not "promptly" transferred. This retroactive application of a "promptness" requirement violates the due process right that a substantive right will not be retroactively taken away. see, Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349, 355 (1971). This unconstitutional result is even more glaring since it is clear the controlling statutes do not contain the undefined word "prompt" or "promptly" and a plain reading of the statutes allows a litigant one year to effect a transfer.

The Superior Court in Williams v. F.L. Smithe Machine Co., Inc., 395 Pa.Super. 511, 577 A.2d 907 (July 1990), stated; "a litigant, upon having his cases dismissed in federal court for lack of jurisdiction, must promptly file a certified transcript of the final judgment of the federal court . . .". The definition of the word "prompt" or "promptly" as it pertains to transfer of a case from state to federal court has never been defined. The Courts of Pennsylvania have retroactively decided that just under seven

months is not "prompt". No further definition was given. It is a due process violation to retroactively define "promptly" as being less then just under seven months. See, Chevron, Supra.

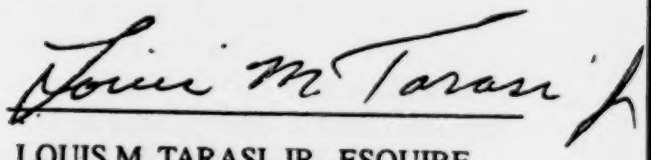
Also, such a ruling is arbitrary and capricious in that it provides no guidance for future litigants. The Superior Court of Pennsylvania had no authority to mandate a new procedural rule, see, Article V § 10(c) of the Pennsylvania Constitution, which gives the Supreme Court of Pennsylvania the exclusive right to make procedural rules that do not abridge, enlarge, nor modify the substantive rights of any litigant. Since the Superior Court did not have authority to mandate that transfers be "prompt," the mandate is a nullity, see, Commonwealth v. Boerner, 281 Pa.Super. 505, 422 A.2d 583, 587, (1980)(when a court takes action beyond the power conferred on it by law . . . its action is a nullity . . .). Since the Superior Court of Pennsylvania decision was a nullity the issue was a case of first impression for the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania affirmed the decision of the Superior Court, Per Curiam, without decision. The ruling by the Supreme Court of Pennsylvania took away the Petitioners substantive right to their day in court by retroactively ruling that a transfer must be made "promptly" without the issue ever be raised before on whether "promptness" is required. This Honorable Court should rule that the Supreme Court of Pennsylvania can not take away a substantive right by ruling that a case must be transferred "promptly" without ever making such a determination before, and after creating an unconstitutionally vague statute by judicially adding the undefined word "prompt" or "promptly" which does not exist in the statute. This is a clear violation of the Petitioners due process rights. Chevron, Supra.

CONCLUSION

This case cries out for justice. The Petitioners, Jean and Terry Collins, satisfied Pennsylvania Statutes, 42 Pa. C.S.A. § 5103 and 42 Pa. C.S.A. § 5535, by timely filing for transfer to state court within one year as required. The Courts of Pennsylvania have decided to disregard and ignore the one year allowance mandated by 42 Pa. C.S.A. § 5535, and have decided that transfer must be made "promptly", without defining the word "prompt" or "prompt-

ly". The Petitioners transferred their case in less than seven months. The Courts of Pennsylvania with no previous ruling on the issue or definition of the word "prompt" or "promptly" decided that a transfer in just under seven months violated the law even though there was no notice that just under seven months was not "prompt" and dismissed the Petitioners cause of action. This Honorable Court should rule that the actions by the Courts of Pennsylvania have violated the Petitioners due process rights and reinstate the Petitioners' cause of action against the Respondents.

Respectfully submitted,



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APPENDIX

APPENDIX INDEX

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RECEIVED
MAY 13 1994

The Supreme Court of Pennsylvania
Western District

CHARLES W. JOHNS, ESQUIRE
PROTHONOTARY
IRMA T. GARDNER
DEPUTY PROTHONOTARY

801 CITY-COUNTY BUILDING
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May 12, 1994

Louis M. Tarasi, Jr., Esq.
David E. Johnson, Esq.
Brian C. O'Leary, Esquire
TARASI & JOHNSON, P.C.
510 Third Avenue
Pittsburgh, PA 15219

In Re: Jean Collins, an individual; and Terry Collins, her husband v. Greene County Memorial Hospital, a Corporation; and Arunava Das, M.D.
No. 0045 W. D. Appeal Docket 1993

Gentlemen:

The Court has entered the following Order on your Petition for Reargument in the above-captioned matter:

"PER CURIAM
AND NOW, this 11th day of May, 1994, Appellants' Application for Reargument is hereby denied.

Mr. Justice Montemuro is sitting by designation as Senior Justice pursuant to Judicial Assignment Docket No. 94 R1800, due to the unavailability of Mr. Justice Larsen, see No. 127 Judicial Administration Docket No. 1, filed October 28, 1993."

Accordingly, the Original Record in the above-captioned matter has been remanded to the Court of Common Pleas of Greene County, Civil Division today May 12, 1994.

Very truly yours,

Irma T. Gardner
DEPUTY PROTHONOTARY

ITG/dal
cc: Thomas J. Madigan, Esq.
Howard K. Hilner, Esq.
Honorable H. Terry Grimes, PJ
Superior Court of Pennsylvania (No. 1251 Pgh. 1991)

[J-63 of 19941
IN THE SUPREME COURT OF PENNSYLVANIA
Western District

JEAN COLLINS, an individual; and TERRY COLLINS, her husband,	)	No. 45 W.D. Appeal Dkt. 1993
Appellants	)	Appeal from Order of Superior Court entered November 2, 1992, at No. 1251 Pittsburgh 1991, Affirming Order of Court of Common Pleas of Greene County, Civil Division, entered une 7, 1991, J at A.D. No. 186 of 1991
v	)	
GREENE COUNTY MEMORIAL HOSPITAL, a Corporation; and ARUNAVA DAS, M.D.	)	419 Pa. Super. 519, 615 A.2d760 (1992)
	)	Argued: March 8, 1994

ORDER

PER CURIAM: Decided: April 13, 1994

Order affirmed.

Mr. Justice Papadakos files a dissenting opinion.

Mr. Justice Montemuro is sitting by designation as Senior Justice pursuant to Judicial Assignment Docket No. 94 R1800, due to the unavailability of Mr. Justice Larsen, see No. 127 Judicial Administration Docket No. 1, filed October 28, 1993.

JUDGMENT ENTERED THIS 13TH DAY OF APRIL, 1994

/s/ Irma T. Gardner
IRMA T. Gardner, Deputy Prothonotary

[J-63 of 1994]
IN THE SUPREME COURT OF PENNSYLVANIA
Western District

JEAN COLLINS, an individual; and TERRY COLLINS, her husband,	)	No. 45 Western District Appeal Docket. 1993
Appellants	)	Appeal from Order of Superior Court entered November 2, 1992, at No. 1251 Pittsburgh 1991, Affirming Order of Court of
v.	)	Common Pleas of Greene County, Civil Division, Entered June 7, 1991, at No. A.D. 186 of 1991
GREENE COUNTY MEMORIAL HOSPITAL, a Corporation; and ARUNAVA DAS, M.D.,	)	419 Pa. Supererior Ct. 519, 615 A.2d 760 (1992)
Apellee	)	ARGUED: March 8, 1994

DISSENTING OPINION

MR. JUSTICE PAPADAKOS Decided: April 13, 1994

I dissent to the Majority's per curiam affirmance of the order of the Superior Court in this matter because, in my view, this case presents us with the opportunity to settle the question of how quickly a litigant must act when he seeks to transfer his state claims to state court which were previously part of a federal court proceeding, and which have been dismissed for lack of jurisdiction, and where the

litigants wish to transfer their state claims to a state court in order to litigate these claims.

The Superior Court has concluded that Jean Collins and Terry Collins (Appellants) were not "prompt" when they waited seven months to file the certified copy of their complaint, pleadings and final judgment from the district court's dismissal of their action, as well as their Praecipe to Transfer, in the Green County Court of Common Pleas. Consequently, the Superior Court affirmed the trial court's order sustaining the preliminary objections of Green County Memorial Hospital and Arunava Das, M.D. (Appellees) and striking the transfer of the action from the federal district court.

Unfortunately, neither the Superior Court's opinion nor this Court's per curiam order offer any definitive guidance on the question of what constitutes a "prompt" transfer of an action pursuant to 42 Pa.C. S 5103 from a federal forum to a state one other than the Superior Court's analogy to the rules developed regarding a writ of summons or complaint which is not served within thirty days. It is true that our cases hold that where a plaintiff commences an action by writ of summons and then cannot perfect service within thirty days by complying with the local rules concerning delivery of the summons to the sheriff within that time, then the failure to make a good faith effort to notify the defendant acts to nullify both the writ of summons and the tolling of any applicable statute of limitations.

However, I, do not read the Superior Court's opinion to be imposing a presumption that the transferred action is "dead" on the thirty-first day, as we have concluded with unserved writs of summons or complaints. In fact, the Superior Court opinion does not specifically adopt a thirty day rule but only concludes that policy reasons justify that a party act "promptly" in transferring his action which has been dismissed for lack of jurisdiction by the federal courts. I would have preferred that we take the opportunity and set a rule for such situations and consider whether there are equitable circumstances which can excuse a delayed filing as well as consider whether the party seeking to dismiss a transfer request based on lateness must also demonastrate that the plantiff's tardiness has caused him prejudice. Because all of these questions remain unanswered, I believe the per curiam disposition of this appeal does a disservice to the bar and these litigants. Hence, I dissent.

PUBLISHED OPINION

Jean COLLINS, an Individual; and
Terry Collins, Her Husband,
Appellants,

v.

GREENE COUNTY MEMORIAL HOSPITAL,
a Corporation and Arunava Das, M.D

Superior Court of Pennsylvania.

Argued March 4, 1992.

Filed Nov. 2, 1991.

Plaintiffs filed praecipe to transfer state claims from federal district court to court of common pleas following judgment by federal court dismissing federal claim and remaining state claims for lack of jurisdiction. The Court of Common Please, Greene County, Civil Division, No. A.D. 186 of 1991, Grimes, J., granted defendant's preliminary objection and struck transfer of case. Plaintiffs appealed. The Superior Court, No. 1251 Pittsburgh 1991, Del Sole, J., held that filing of praecipe to transfer claims seven months after federal court's order of dismissal was untimely justifying striking of transfer.

Affirmed.

Johnson, J., dissented and filed opinion.

1. Courts 494

Filing of praecipe to transfer case from federal district court to court of common pleas seven months after judgment by federal court on federal claim and dismissal of remaining state claims for lack of jurisdiction was untimely justifying striking of transfer. 42 Pa.C.S.A §§102, 5103, 5103(a, b).

2. Courts 494

Litigants must act promptly in transferring their state court actions which have been dismissed for lack of jurisdiction by federal courts. 42 Pa.C.S.A. §§102, 5103, 5103(a, b).

Joseph J. Hinchliffe, Pittsburgh, for appellants.

Thomas J. Madigan, Pittsburgh, for appellee Greene County Memorial.

Before DEL SOLE, JOHNSON and FORD ELLIOTT, JJ.

DEL SOLE, JUDGE.

We are asked to consider the right of a litigant, under 42 Pa.C.S. § 5103, to transfer state claims from a federal district court to a court of common pleas following a judgment by the federal court on a federal claim and dismissal of the remaining state claims for lack of jurisdiction. The trial court determined that, because of a seven month delay between the federal court's dismissal of the state claims and the litigant's praecipe to transfer the case, the praecipe was untimely filed. The trial court issued an order which struck the praecipe. We affirm.

Jean and Terry Collins, husband and wife, (the Collinses) brought an action against Greene County Memorial Hospital and Dr. Arunava Das (hereinafter collectively referred to as "Hospital") in the United States District Court for the Western District of Pennsylvania. This suit was comprised of a federal claim based upon the Civil Rights Act of 1964 and several state claims which were before the court on the basis of pendent jurisdiction. On August 17, 1990, following a settlement between the parties on the federal civil rights claim, the district court entered a judgment and final decree on that claim. Six days later, the court dismissed the remaining state claims for lack of jurisdiction.

Nearly seven months later, on March 19, 1991, the Collinses filed a certified copy of the complaint, pleadings, and final judgment from the district court, as well as a Praecipe to Transfer, with-

the Greene County Court of Common Pleas in order to litigate their state claims.

The Hospital filed preliminary objections to the transfer, contending that the documents were not promptly filed. The trial court agreed, noting that "[t]he effort and time needed to file in state court pursuant to the statute is less than would be expected in filing an amended pleading or filing a responsive pleading after disposition of preliminary objections", Opinion of June 7, 1991, at 3, and that, in either of those cases, the Pennsylvania Rules of Civil Procedure allot twenty days. The trial court concluded that this case could not be deemed to have been promptly transferred where the Collinses had taken more than two hundred days to act. Said the court, "as a matter of statutory construction, the filing was not `prompt', as mandated by the transfer statute, the sole vehicle for the plaintiffs to transfer their case from federal court to this court." Opinion at 44.

In Pennsylvania, 42 Pa.C.S. § 5103 governs the transfer of cases from federal court to state court. That statute states, in pertinent part:

§ 5103. Transfer of erroneously filed matters

(a) General rule.-If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth which does not have jurisdiction of the appeal or other matter, the court or district justice shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth, where the appeal or other matter shall be treated as if originally field in the transferee tribunal on the date when the appeal other matter was first filed in a court or magisterial district of the Commonwealth. A matter which is within the exclusive jurisdiction of a court or district justice of this Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court or magisterial district of this Commonwealth where it shall be treated as if orininally filed in the tranferee court or magestrial district of this Commonweath on the date when first filed in the other tribunal.

(b) Federal cases.-

(1) Subsection (a) shall also apply to any matter transferred or remanded by any United States court for a district embracing any part of this Commonwealth. In order to preserve a claim under Chapter 55 (relating to limitation of time), a litigant who timely commences an action or proceeding in any United States court for a district embracing any part of this Commonwealth is not required to commence a protective action in a court or before a district justice of this Commonwealth. Where a matter is filed in any United States court for a district embracing any part of this Commonwealth and the matter is dismissed by the United States court for lack of jurisdiction, any litigant in the matter filed may transfer the matter to a court or magisterial district of this Commonwealth by complying with the transfer provisions set forth in paragraph (2).

(2) Except as otherwise prescribed by general rules, or by order of the United States court, such transfer may be effected by filing a certified transcript of the final judgment of the United States court and the related pleadings in a court or magisterial district of this Commonwealth. The pleadings shall have the same effect as under the practice in the United States court, but the transferee court or district justice may require that they be amended to conform to the practice in this Commonwealth. Section 5535(a)(2)(i) (relating to termination of prior matter) shall not be applicable to a matter transferred under this subsection.

42 Pa.C.S. § 5013(a) and (b).

The trial court construed §5103 to impose a promptness requirement, and determined the seven month delay to have been excessive. Thus, the court issued an order granting Hospital's preliminary objection and striking the transfer of the case from federal court. The Collinses appealed.

On appeal, the Collinses contend that no timeliness requirement is imposed by the statute, and that, therefore, notwithstanding the seven month delay, the trial court erred by concluding that the filing of the praecipe was not sufficiently prompt. In response, Hospital contends that a promptness requirement is imposed by this court's

decision in *Williams v. F.L. Smithe Machine Company, Inc.*, 395 Pa.Super. 511, 577 A.2d 907 (1990), *appeal denied* 527 Pa. 650, 593 A.2d 422 (1991).

[1] In *Williams*, this court held that if a matter is originally filed within the statute of limitations in federal court but is dismissed for lack of jurisdiction, a litigant may effect transfer of the action to a state court by complying with the provisions of 42 Pa.C.S. § 5103(b), and the state court will treat the matter as if it were originally filed in the state court, despite the fact that the federal court took no action to transfer the case or take any other action.[1].

We also held that dismissal of the action by the trial court was not appropriate even though the plaintiffs had failed to file a *certified* transcript of the final judgment of the United States court and related pleadings until seven months after the federal court granted the motion to dismiss. Given the dearth of case law interpreting this statute and the fact that Appellants partially complied with the statute just 14 days after the case was dismissed by filing a certified copy of the order dismissing the action along with a new complaint, identical to the complaint filed in federal court, we held that dismissal of the complaint for lack of promptness would be unduly harsh. We also stated that to protect the timeliness of an action a litigant must promptly file a certified copy of the transcript of the

---

1 The dissent claims that this case is not included within the scope of § 5103 because we must read this section to allow transfer only when the transferring court lacks jurisdiction over the entire matter, which is defined in 42 Pa.C.S. § 102 as an action, proceeding, or appeal. Because the transferring court had jurisdiction over the matter, at least until the Federal claim was resolved, the dissent argues that § 5103 cannot be used to toll the statute and effect transfer to the state court.

However, the purpose of the Federal-State transfer statute would be frustrated by such a construction. To hold otherwise would require the filing of State protective actions every time a federal claim with pendant state claims is filed in Federal court on the off chance that if the federal claim is resolved, the litigant will be barred from pursuing the state claim. This is the very problem, the elimination of duplication of effort, which this statute was designed to prevent.

Furthermore, it seems equally logical to construe the language of this statute to include cases with facts "similar" to those present here. After all, once a federal claim is resolved, the entire "matter" or "action" before the federal court is a state "action" made up of state claims, and therefore when the federal court dismisses the "matter" for lack of jurisdiction, the provisions of § 5103(b) may be used to effect transfer of the action.

final judgment of the federal court along with a certified copy of the pleadings in state court.

In the instant case the Appellants gave no indication of their intention to pursue their state claims for nearly seven months after the federal court's Order of Dismissal. Furthermore, after *Williams*, the Appellants cannot claim that because of a lack of interpretive case law under § 5103, they did not know what was required of them. Therefore, we hold that Appellant's actions were not prompt, and the order striking the transfer was proper.

We find Appellees' analogy with the case law that has developed regarding the writ of summons or complaint and then failing to effect service on the defendant persuasive. *Lamp v. Heyman*, 469 Pa. 465, 366 A.2d 882 (1976); *Robinson v. Trenton Dressed Poultry* Co., 344 Pa.Super. 545, 496 A.2d 1240 (1985). Beginning with *Lamp*, our courts have held that if a plaintiff commences an action by writ of summons and then does not attempt service within 30 days by complying with the local rules concerning delivery of the summons to the sheriff within that time, then that failure to make a good faith effort to notify the defendant will serve to nullify both the commencement of the action and the tolling of statute of limitations. This rule of promptness established by the courts was held to be consistent with the policy of avoiding stale claims, making the processes of justice as speedy and efficient as possible, and preventing the possibility of the plaintiff retaining exclusive control over the action for a period in excess of the statute of limitations.

When a litigant transfers an action under §5103(b), this section, like the filing of a writ of summons, provides protection from the bar of the statute of limitations. This protection comes into play in the situation where the litigant has timely filed an action, such that notice to the defendant is sufficient for statute of limitations purposes, but as the federal court subsequently determines, has filed in the wrong court. If, however, a litigant fails to promptly transfer the action to the appropriate court, then the litigant abuses that protection, (as was done prior to *Lamp* by parties commencing actions by writ of summons,) subverts the policies underlying the statute of limitations, and undermines the speedy and efficient process of justice.

[2] Therefore, we hold that litigants must act promptly in transferring their actions which have been dismissed for lack of jurisdiction by the Federal courts. We again ask, as we did in *Williams, supra*, 395 Pa.Super. at 511, n. 1, 577 A.2d 907, that our Legislature will see fit in the future to include a specific time requirement of 30 days in the provisions of 42 Pa. C.S.A. § 5103.

Order is affirmed and jurisdiction relinquished.

JOHNSON, J., files a dissenting opinion.

JOHNSON, Judge, dissenting.

I am unable to conclude that the statute dealing with the transfer of erroneously filed matters has any applicability to the facts presented in the within appeal. Nor do I find any support for my esteemed colleagues' conclusion that the purpose of the transfer statue is to eliminate duplication of effort. By its express terms, the statute under review requires that the transferring court be without jurisdiction over the matter before the authorization to transfer is triggered. There is absolutely nothing in the certified record of this case to even suggest that the federal district court was without jurisdiction over the matters involved. Since I find the construction placed upon the statute by my colleagues to be both strained and fraught with the potential for future mischief, I must dissent.

I begin by stating that the most distinguished trial judge arrived at the right conclusion by striking the praecipe which sought to transfer this action from the federal district court. However, I believe that the focus on the *timeliness* of the attempted transfer-by the trial court by the litigants, and by my colleagues in the majority-is misplaced.

We have been asked to determine whether, under *Williams v. F.L. Smithe Machine Company, Inc.*, 395 Pa.Super. 511, 577 A.2d 907 (1990), *appeal denied* 527 Pa. 650, 593 A.2d 422 (1991), the plaintiffs' seven month delay precludes a transfer of their state law claims pursuant to Section 5103 of the Judicial Code, 42 Pa.C.S. § 5103. I conclude that *Williams* is inapplicable to the present case and that the claims presented here were not transferable under §

5103 regardless of the plaintiffs' delay. The decision of the trial court was correct, albeit for what I believe to have been the wrong reasons.

Where a court makes a correct ruling, order, decision, judgment or decree, but assigns an erroneous reason for its action, an appellate court will affirm the action of the trial court and assign the proper reason therefor. *Taylor v. Churchill Valley Country Club*, 425 Pa. 266, 268, 228 A.2d 768, 769 (1967); *Sherwood v. Elgart*, 383 Pa. 110, 117 A.2d 899 (1955); *Coatesville Development Company v. United Food and Commercial Workers, AFL-CIO*, 374 Pa.Super. 330, 338, 542 A.2d 1380, 1384 (1988). This approach however is only appropriate where the correct basis for the ruling, order, decision, judgment or decree is clear upon the record. *Bearoff v. Bearoff Brothers, Inc.* 458 Pa. 494, 501, 327 A.2d 72, 76 (1974). I would submit that the correct basis for the striking of the transfer praecipe is, indeed, clear upon this record.

The docket entries, along with certified copies of the pleadings and other documents filed in the case of Collins v. Greene County Memorial Hospital, at Civil Action No. 88-967, in the United States District Court for the Western District of Pennsylvania, have been certified from the record by Catherine D. Martrano, Clerk. they were filed of record, on March 19, 1991, at A.D. No. 186 of 1991 in the Court of Common Pleas of Greene County. All of these pleadings were before the trial court when it entertained the hospital's preliminary objections and motion for summary judgment.

Those certified documents reveal that the case originated in federal district court on April 29, 1988 upon the filing of a complaint. Jurisdiction in the court was alleged to be found by virtue of Title VII of the Civil Rights Act of 1964, as amended at 42 U.SC. § 2000e *et seq.* That jurisdictional claim was formally contested in boilerplate defenses by the defendant hospital (Answer to Complaint filed July 1, 1988, Eighth, Twelfth and Fourteenth Defense(s)) and by the defendant doctor (Motion to Dismiss filed July 18, 1988, Sections I and II). In any event, the jurisdictional issue was settled no later than May 22, 1990 when District Judge Gustave Diamond (1) held a hearing on all outstanding motions, (2)

denied all outstanding motions to dismiss, and (3) decreed that discovery would be completed within 120 days after the plaintiff's deposition.

The Title VII portion of the action was concluded favorably to the plaintiffs. The amount of the settlement in favor of the plaintiffs is not spread upon the certified record. Nevertheless, that record establishes that, on October 29, 1990, after the case had been in litigation for exactly two and one-half years, the federal district judge awarded attorneys' fees to the plaintiffs totaling $22,600 along with costs in the amount of $1,082.38. The plaintiffs were the prevailing parties. 42 U.S.C. § 1988. Updated Stipulation of the parties, filed October 29, 1990 at No. 88-967.

On this appeal, my colleagues assume and assert that the action pursued at No. 88-967 was dismissed for lack of jurisdiction. The certified record belies that assertion. In dismissing the plaintiffs' claims which were remaining following the settlement of the Title VII claim, United States District Judge Diamond stated, in pertinent part:

> On August 17, 1990, we entered judgment on plaintiff Jean Collins' Title VII claims against defendant ... "Hospital" upon the consent of the parties. Thus, the only claims which remain before us are the plaintiffs' pendant [sic] state claims against the Hospital and against the pendant party ... "Das".
>
> Having given the matter due consideration, *the court will exercise its discretion in favor of dismissing the pendant claims* given that judgment has been entered on the sole claim over which we have independent jurisdiction. First,..., we conclude that *it is inappropriate for us to retain jurisdiction* over claims asserted against defendant Das after judgment has been entered on the claims over which we had independent jurisdiction.... We note also that some of the claims remaining are those asserted by plaintiff Terry Collins, a non-diverse party who has not asserted any federal claims against the defendants. These circumstances, coupled with the entry of judgement on the only federal claims in this suit, convince us that *a decision to not exercise "pendant party jurisdiction"* [sic] over defendant Das *is appropriate*.

> Second, *we note that the decision on whether to exercise jurisdiction over pendant claims lies in the sound discretion of the district court....*
>
> Accordingly, for the reasons set forth above, IT IS ORDERED that the plaintiffs' remaining claims against defendant Greene County Memorial Hospital and their claims against defendant Arunava Das be, and hereby are, dismissed.
>
> s/Gustave Diamond
> United States District Judge

Memorandum Order, Diamond, D.J., August 23, 1990, pages 1-3, filed August 24, 1990 at No. 88-967, *certified copy filed* March 19, 1991 at Civil Division A.D. No. 186, 1991 (emphasis added).

There is absolutely nothing in the Memorandum Order itself or in the federal district court docket entries to support an assertion that the case filed at No. 88-967 was dismissed for lack of jurisdiction. To the contrary, Judge Diamond correctly observed that pendent jurisdiction is a doctrine of discretion, and the power in federal courts to hear both state and federal claims, assuming substantiality of the federal issues, need not be exercised in every case in which it is found to exist. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725-26, 86 S.Ct. 1130, 1138-39, 16 L.Ed.2d 218, 227-28 (1966).

Although Judge Diamond stated, by way of dictum in his Memorandum Order quoted above, that the plaintiffs would not suffer the prejudice of having a statue of limitations problem, following dismissal, in light of 42 Pa.C.S. § 5103(b), there is nothing included in the record to either explain or support that assertion. Moreover, Judge Diamond would have been aware that no one may properly rely upon what the federal district court might say as persuasive on any question of Pennsylvania law so long as our Pennsylvania Supreme Court has not ruled upon the legal question. *Aceto v. Zurich Insurance Company*, 440 F.2d 1320 (3rd Cir.1971).

I conclude, after a careful review of the entire record, that the plaintiffs brought their action in the federal district court, by

choice, on April 29, 1988. After two and one-half years of litigation as evidenced by the certified record the plaintiffs secured a favorable settlement of their Title VII claim. After that claim was settled, Judge Diamond dismissed the remaining claims on August 23, 1990, finding that the further exercise of pendent jurisdiction was not appropriate. The Memorandum Order by which Judge Diamond dismissed the pending state claims does not permit an inference that the federal district court found itself to be without jurisdiction. To the contrary, its earlier order of May 22, 1990 dismissing all pending pretrial motions established that the district court deemed itself to have jurisdiction over all the claims then pending.

With these facts as background, this court must then consider the proper application of Section 5103 of the Judicial Code, 42 Pa.C.S. § 5103, to the attempted transfer now under review.

The majority would argue that the purpose of the act which they term the Federal-State transfer statute is to obviate the transfer of actions from federal courts where pendent state claims are involved. I have found nothing in the history of this statute to support that claim. To the contrary, the enactment of Section 5103 of the Judicial Code, 42 Pa.C.S. § 5103, and its various parts can lead but to one conclusion: From its inception, the statute has been intended to apply only where a case has been erroneously filed in the wrong court.

The present Section 5103(a) first appeared as Section 503(b) of the Appellate Court Jurisdiction Act of 1970. In its original form, the subsection was enacted as follows:

Section 503. Waiver of Objections to Jurisdiction; Transfer of Cases.

(a) .....

(b) *If an appeal or other matter is erroneously* taken to or *brought in a court which does not have jurisdiction of the appeal* or other matter, *the court* shall not quash such appeal or dismiss the matter, but *shall transfer the record thereof*, at the cost of the

> appellant, petitioner or plaintiff, *to the proper court* of this Commonwealth, *where the appeal* or other matter *shall be treated as if originally filed* in the court *on the date erroneously filed in the other court.*

Act No. 223 of 1970, P.L. 673, art. V, § 503 at P.L. 679 (formerly 17 P.S. § 211.503) (emphasis added). The language of the subsection makes it clear that Section 503(b), at its inception, was intended to cover only those cases where a matter had been erroneously lodged in the wrong court.

Prior to the enactment of the Appellate Court Jurisdiction Act, the Second Class Township Law of 1933 contained a similar section that was re-enacted without change in 1947, and has since been incorporated into Section 5103(a). As originally enacted, the 1933 Law contained this section, in its entirety:

> **Section 1049**. Appeals to the wrong Court.-
> Should any appeal under this article be made *to the wrong court*, such court shall certify the appeal to the court *to which it should have been taken.*

Act No. 69 of 1933, P.L. 103 art. X § 1049 at P.L. 156 (formerly 53 P.S. §66049), reenacted without change, Act No. 567 of 1947 P.L. 1481, Section 15, re-enacting, revising and amending Second Class Township Law Sections 1020 to 1101 inclusive, at P.L. 1558.

Moreover, the 1965 act providing for the transfer of any cause mistakenly appealed to any court from a judgment of a magistrate or justice of the peace compels the same conclusion. The 1965 act, in its entirety, provided:

> Section 1. Whenever an appeal from a judgment of a magistrate or justice of the peace is taken to any court *instead of the court to which it should have been taken*, the appeal shall not thereby be lost, but the court to which the appeal was taken shall transfer the cause to the court *to which the appeal should properly have been taken.*

Act No. 156 of 1965, P.L. 298, § 1, (formerly 42 P.S. § 929) (emphasis added).

The 1933/1947 act and the 1965 act set forth above, as well as Section 503 of the Appellate Court Jurisdiction Act of 1970, are all now lodged in Section 5103 of the Judicial Code of 1976, as amended.

Whether we look to the catchlines of the Pamphlet Laws or review the content of each act, only one conclusion seems possible. All of the acts dealing with transfer of matters from one court to another, including the 1933, 1947, 1965, 1970 and 1976 acts, require that a matter be erroneously filed in the wrong court before a transfer is authorized under the act.

The headings prefixed to sections of a statute shall not be considered to control but may be used to aid in the construction thereof. 1 Pa.C.S. § 1924; *Fedor v. Borough of Dormont*, 487 Pa. 249, 254 n. 3, 409 A.2d 334, 337 n. 3 (1979). Each time the legislature has passed legislation affecting Section 5103, it has used the identical catchline: Transfer of erroneously filed matters. *See* Act 1976-142, P.L. 586 at P.L. 695; Act 1978-53 (Judiciary Act Repealer Act), P.L. 202 at P.L. 397; Act 1982-326 (JARA Continuation Act of 1982), P.L. 1409 at P.L. 1422. Even before that more recent history, the legislature spoke only in terms of "Appeals to the Wrong Court", see Act 1933-69, P.L. 103 at P.L. 156; Act 1947-567, P.L. 1481 at P.L. 1558; or "Whenever an appeal ... is taken to any court instead of the court to which it should have been taken ..." Act 1965-156, P.L. 298.

In construing Section 5103 of the Judiciary Code, the legislative intent controls. The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of our General Assembly. 1 Pa.C.S. § 1921(a). However, when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. 1 Pa.C.S. § 1921(b).

When I turn to the statute in its present form, which has not undergone any change since passage of the JARA Continuation Act of 1982, I find it to be crystal clear and free from any ambiguity.

In the JARA Continuation Act of 1982, Act 1982-326, P.L. 1409, the legislature continued to use the catchline, "Transfer of erroneously filed matters." See P.L. 1409 at P.L. 1422. Under both subsection (a) and subsection (b) of Section 5103, the plaintiffs are barred from effecting transfer.

Subsection (a) of Section 5103 provides, in pertinent part:

§ 5103. Transfer of erroneously filed matters.

(a) General rule.-*If an* appeal or *other matter* is taken to or *brought in a court* ... of this Commonwealth *which does not have jurisdiction of the* appeal or other *matter*, the court ... shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth.....

42 Pa.C.S. § 5103(a) (emphasis added). I can only read the emphasized clause-"if a matter is brought in a court which does not have jurisdiction"-as a proviso. Provisos shall be construed to limit rather than to extend the operation of the clauses to which they refer. 1 Pa.C.S. § 1924. The right to transfer the record therefor must depend upon the matter having been erroneously filed. Under subsection (a), the plaintiffs on this appeal could not prevail.

When we proceed to examine subsection (b), the same result is dictated. That subsection provides, in pertinent part:

(b) Federal cases.-

(1) Subsection (a) shall also apply to any matter transferred or remanded by any United States court for a district embracing any part of this Commonwealth.... Where a matter is filed in any United States court for a district embracing any part of this Commonwealth *and the matter is dismissed by the United States court for lack of jurisdiction*, any litigant in the matter filed may

> transfer the matter to a court ... of this Commonwealth by complying with the transfer provisions set forth in paragraph (2).

42 Pa.C.S. § 5103(b) (emphasis added). There are two independent reasons contained in subsection (b) militating against a transfer by the plaintiffs in this case. If the matter is transferred by the United States court, itself, subsection (a) is mandatory in its application, thereby bringing into play the proviso discussed above. On the other hand, in order for a litigant to transfer the matter, as may have been attempted in this case, the statute is equally clear that it requires the matter must have been dismissed for lack of jurisdiction. Again, the proviso in subsection (b) can only be understood to limit rather than to extend the operation of the transferring clause to which it refers. 1 Pa.C.S. § 1924.

I conclude that Section 5103 is only applicable in those situation where it can be established that the action was originally filed in the wrong court. In this case, extremely competent plaintiffs' counsel elected to file the sexual harassment suit in a federal district court and pursue that venue for two and one-half years. Counsel secured a favorable result for their clients. Plaintiffs, in their Appellants' Brief, assert that Judge Diamond entered "a Memorandum Order dismissing Plaintiffs' remaining state claims for lack of subject matter jurisdiction." That assertion simply is not borne out by the plain language of the Order quoted above.

The action was dismissed not for *lack of jurisdiction* but because the federal district court, in proper exercise of its discretion, determined that it would decline to *continue* the exercise of jurisdiction which it had previously found no later than May 22, 1990. The state and federal claims did derive from a common nucleus of operative fact. A review of the complaint filed originally in the federal district court establishes that the claims raised by this suit would ordinarily be expected to be tried in one judicial proceeding. The plaintiffs pled that the physician-defendant had forced the wife-plaintiff to perform an involuntary deviate sexual act, that the hospital-defendant had violated its obligations under the 1964 Civil Rights Act, that the hospital had been negligent in its hiring, placement and supervision of the doctor-defendant, and that the wife-plaintiff had undergone an assault, a battery and intentional inflic-

tion of emotional distress, all arising from her attempts to thwart or terminate the sexual harassment. All of the acts complained of involve the relationship between the plaintiffs, the doctor-defendant and the hospital-defendant. Given the substantiality of the federal, civil rights claim set forth in Count I of the complaint filed in the federal district court, there can be no question but that the district court had the power, that is to say, the *jurisdiction*, to hear the entire case. *United Mine Workers of America v. Gibbs, supra.*

Section 5103, by its terms, permits a transfer where a "matter is taken to or brought in a court ... *which does not have jurisdiction of the ... matter*". Here, the action was first brought in the federal district court. Under the law set forth in *Gibbs*, that court *had* jurisdiction over the matter. Therefore, this case is not included within the scope of § 5103.

This result is further supported by our legislature's use of the term "matter" to describe what may be transferred under this statute. A "matter" is defined to be "an action, proceeding or appeal." 42 Pa.C.S. § 102. an "action" is "[a]ny action at law or in equity." *Id.* A "proceeding" is defined to include "every declaration, petition or other application which may be made to a court under law or usage or under special statutory authority, but the term does not include an action or appeal." *Id.* This legislative language forces the conclusion that § 5103 only provides authority to transfer the entire action as a result of the transferring court's lack of jurisdiction over the entire case. That section does not permit nor does it anticipate the transfer of individual claims. Therefore, even if the Collinses' attempt to transfer via the statute would be considered as having been timely filed, one must conclude on this independent ground, alone, that the transfer was not permitted by the statute.

The parties rely extensively on *Williams v. F.L. Smithe Machine Company, Inc., supra,* for their arguments regarding the existence of a "promptness" requirement. However, *Williams* is inapplicable to this case. There, a transfer from the federal district court to the state court was attempted following the federal court's dismissal for lack of jurisdiction over the case. That dismissal was based upon a lack of diversity between the parties. There was never any question in *Williams* about the lack jurisdiction. Because the federal

court in *Williams* never had jurisdiction over the "matter," that transfer was properly within the terms of Section 5103. Here, the federal court had jurisdiction to enter an order as to all of the claims originally presented to it. Therefore, it cannot be said that the matter was filed with a court that did not have jurisdiction. Accordingly, *Williams* is inapplicable to the instant case.

I began by suggesting that the reasoning set forth by my colleagues presented the potential for future mischief. It must be borne in mind that the only concern of the legislature in each and all of the separate acts not incorporated into Section 5103 was to provide a vehicle by which cases *mistakenly filed* in the *wrong court* could be transferred to the court in which they should have initially been brought. Common experience should instruct us that the time involved in determining that a court is completely without jurisdiction in a matter is normally relatively short.

The majority would raise the specter of the "need" to file state protective actions. An examination of the statute demonstrates that the legislature has already considered that contingency in the only factual situations intended to be covered by the act. Section 5103(b)(1) already provides that, where a matter has been erroneously filed:

> In order to preserve a claim under Chapter 55 (relating to limitation of time), a litigant who timely commences an action or proceeding in any United States court ... is not required to commence a protective action in a court ... of this Commonwealth. Where a matter is filed in any United States court ... *and the matter is dismissed ... for lack of jurisdiction*, any litigant in the matter filed may transfer the matter to a court ... of this Commonwealth ...

42 Pa.C.S. § 5103(b)(1) (emphasis added). The majority would ignore the clear, often repeated proviso that proclaims lack of jurisdiction as the prerequisite for transfer eligibility. I submit that the rules of statutory construction set forth in the Pennsylvania Consolidated Statutes prohibit the result sought by my colleagues.

I earnestly believe that the words of this statute are clear and free from all ambiguity. 1 Pa.C.S. § 1921(b). Even if it could be argued that the words lack clarity-an assertion which I believe is unsupportable-the legislature has declared through the statute's catchline that the object to be obtained is the transfer of *erroneously filed matters*. The mischief to be remedied, originally, was the loss of the right to pursue an appeal because the appeal would have been filed in the wrong tribunal. The former laws on this subject are uniform in declaring that. Consideration of these matters leads to the same conclusion: Section 5103 was never intended to deal with matters properly filed in a federal district court where the plaintiffs receive a settlement on the federal claim in the district court and then attempt to transfer the balance to the state courts. 1 Pa.C.S. § 1921(c).

No reason is advanced by appellants as to why they elected to attempt a transfer of some of their claims two and one-half years after the suit was originally brought. There has been no suggestion that the plaintiffs were in any way prevented from pursuing all of their claims in the district court. I agree with the appellants that the language of Section 5103 is both clear and unambiguous. In the face of the clear language requiring an erroneous filing, I am at a loss in locating the statutory language undergirding my colleagues' decision.

Because I would determine that the requirement for an erroneous filing has not been met, I do not reach the question of whether the Memorandum Order of Judge Diamond entered August 23, 1990 meets the requirement for a "final judgment of the United States court" as required under subsection (b)(2) of Section 5103 of the Judicial Code, 42 Pa.C.S. § 5103(b)(2).

I would leave to the wisdom and experience of the legislature whether special provisions should be enacted for those plaintiffs who would like to have it both ways. I find the present provisions adequate to protect parties who have mistakenly filed a matter in the wrong tribunal. The order dismissing the praecipe for transfer should indeed be affirmed, not as a result of any promptness analysis but because Section 5103 is inapplicable. The history of the statutory section and its wording demonstrate that it was not

intended to be used as the appellants would have this court interpret it. I therefore register my dissent.

IN THE COURT OF COMMON PLEAS OF GREENE COUNTY, PENNSYLVANIA

JEAN COLLINS, an individual; and TERRY COLLINS, her husband,	)	
Plaintiffs,	)	
vs.	)	A.D. No. 186 of 1991
GREENE COUNTY MEMORIAL HOSPITAL, a corporation; and ARUNAVA DAS, M.D.,	)	
Defendants.	)	

APPEARANCES:

JOSEPH J. HINCHLIFFE, ESQUIRE, Attorney for the Plaintiffs

THOMAS M. MADIGAN, ESQUIRE, Attorney for Defendant Greene County Memorial Hospital

FREDERICK W. THIEMAN, ESQUIRE, Attorney for Defendant, Arunava Das, M.D.

OPINION

The plaintiffs brought an action in the United States District Court for the Western District of Pennsylvania on April 29, 1988. This suit comprises a federal issue, based an the Civil Rights Act of 1964, and several state issues, which were in federal court by way of pendant jurisdiction. On August 17, 1990, the district court entered a judgment and final decree on the federal issue, and six days later dismissed the state claims for lack of jurisdiction.

From August 23, 1990 until March 19, 1991, the plaintiffs took no action. On March 19, 1991, the plaintiffs filed a certified copy of the complaint, pleadings, and final judgment from the U.S. District Court in this court pursuant to 42 Pa. C.S.A. §5103 together with a Praecipe to Transfer.

The defendants now file preliminary objections, or in the alternative, a motion for summary judgment, to the transfer as not in keeping with the transfer statute. They also raise the statute of limitations by way of preliminary objections, or in the alternative, a motion for summary judgment.

A motion for summary judgment is appropriate only after the pleadings are closed (Pennsylvania Rule of Civil Procedure 1035, 42 Pa.C.S.A.), therefore the defendants' motion for summary judgment will not be considered.

An issue of a violation of a statute of limitations cannot be raised other than by a responsive pleading as new matter (Pennsylvania Rule of Civil Procedure 1017(b)(4) and note, 42 Pa. C.S.A.), therefore that objection is denied.

The remaining issue of the refiling not being in conformity to law (Pennsylvania Rule of Civil Procedure 1017(b)(2), 42 Pa.C.S.A.) must be determined. In order to be in conformity with the transfer statute, 42 Pa.C.S.A. §5535, the plaintiffs must have filed in this court a certified copy of the complaint, the docket entries, and the final resolution dismissing the case from federal court and must have done so promptly.

The defendants do not question the correctness of the documents, only that they were not promptly filed. "Prompt" as a term in this statute has never been defined. In analyzing this word and its usefulness in the statute, it is important to note that the only other action required of the plaintiff is the filing of a certified copy of the federal court file. This would be neither time consuming nor difficult. Further, since this particular case had its federal question settled by agreement of the parties, the plaintiffs would not have been surprised by dismissal by the district court.

The effort and time needed to file in state court pursuant to the statute is less than would be expected in filing an amended pleading or filing a responsive pleading after disposition of preliminary objections. In both cases, the Pennsylvania Rules of Civil Procedure allot twenty (20) days. Compared with the approximately two hundred (200) days taken to file in the present case, there is an implication that the plaintiffs' filing was not prompt. Further, the record is devoid of a justification for the delay.

In conclusion, as a matter of statutory construction, the filing vas not "prompt," as mandated by transfer statute, the sole vehicle for the plaintiffs to transfer their case from federal court to this court.

IN THE COURT OF COMMON PLEAS OF GREENE COUNTY, PENNSYLVANIA

JEAN COLLINS, an individual; and TERRY COLLINS, her husband,	)	
Plaintiffs,	)	
vs.	)	A.D. No. 186 of 1991
GREENE COUNTY MEMORIAL HOSPITAL, a corporation; and ARUNAVA DAS, M.D.,	)	
Defendants.	)	

ORDERS

AND NOW, this 7th day of June, 1991, it is ORDERED the preliminary objection of the defendants is sustained and the transfer of the action from Federal Court is stricken.

ATTEST:

/s/ Richard Rosendale
PROTHONOTARY

BY THE COURT:

/s/ H. Terry Grimes
PRESIDENT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JEAN COLLINS, an individual; and TERRY COLLINS, her husband,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 88-967
GREEN COUNTY MEMORIAL HOSPITAL, a corporation; and ARUNAVA DAS, M.D.,	)	
Defendants.	)	

MEMORANDUM ORDER

AND NOW, this 23rd day of August, 1990:

On August 17, 1990, we entered judgment on plaintiff Jean Collins' Title VII claims against defendant Green County Memorial Hospital ("Hospital") upon the consent of the parties. Thus, the only claims which remain before us are the plaintiffs' pendant state claims against the Hospital and against the pendant party Arunava Das ("Das").

Having given the matter due consideration, the court will exercise its discretion in favor of dismissing the pendant claims given that judgment has been entered on the sole claim over which we have independent jurisdiction. First, in light of the recent Supreme Court decision of Finley v. United States, 104 L.Ed.2d 593 (1989), we conclude that it is inappropriate for us to retain jurisdiction over claims asserted against defendant Das after judgment has been entered on the claims over which we had independent jurisdiction. Das was brought into this suit as a "pendant party," and Finley

sharply circumscribes federal court exercise of such jurisdiction. We note also that some of the claims remaining are those asserted by plaintiff Terry Collins, a non-diverse party who has not asserted any federal claims against the defendants. These circumstances, coupled with the entry of judgment on the only federal claims in this suit, convince us that a decision to not exercise "pendant party jurisdiction" over defendant Das is appropriate.

Second, we note that the decision on whether to exercise jurisdiction over pendant claims lies in the sound discretion of the district court. E.g., United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). In exercising that discretion, we note that we have determined above that we should not exercise jurisdiction over defendant Das in light of Finley. Thus, the plaintiffs and defendants would be threatened with a multiplicity of actions if we were to retain jurisdiction over the claims against the Hospital. Furthermore, we note that the plaintiffs will not suffer the prejudice of having a statute of limitations problem in light of 42 Pa.C.S.A. § 5103(b), which will permit them to pursue the claims asserted here in the courts of the Commonwealth. Thus, we conclude that there is no potential prejudice to the plaintiffs which warrants our exercising our discretion in favor of retaining jurisdiction over plaintiffs' pendant claims.

Accordingly, for the reasons set forth above,

IT IS ORDERED that the plaintiffs' remaining claims against defendant Green County Memorial Hospital and their claims against defendant Arunava Das be, and hereby are, dismissed.

/s/ Gustave Diamond
United States District Judge